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NEW JERSEY

Court of Errors and Appeals.

Between

ELIAS A. WILKINSON, *et al.*,
Appellants,

and

MICHAEL BAUERLE, *et al.*,
Respondents.

On Appeal from Decree in Chancery.

BRIEF OF P. WOODRUFF, FOR RESPONDENTS.

In the above case the appellants who were the officers, directors and stockholders of an insolvent Sewing Machine Company, organized under the laws of New Jersey, sold to its president all of the assets of the corporation, excepting a small amount of book accounts; these assets, consisting of machinery, tools, patterns, castings, patents, &c., were transferred to him under the following circumstances:

The president, who was the defendant, Elias A. Wilkinson, was liable as endorser upon the Company's commercial paper to the amount of $30,000, and held $44,900 out of $72,500 of its stock in his own right; he caused the superintendent to make a valuation of the above assets, which valuation amounted to $47,000 provided the business was continued, and to but $22,000 if the business was to be stopped at that time.

After this was done the president called a meeting of the board of directors and offered to give

$50,000 for such assets, and, with the other directors, voted that the same be sold, and they were sold to himself at that price. By this action the president was enabled, with others, to form a new company, which issued stock to the amount of $500,000 for such property; $200,000 to himself and the balance to others, and to free himself from all liability as endorser upon the company's obligations by paying the debts of the corporation. All creditors of the company have been paid in full, except the respondents, who hold a judgment against the company. The bill in this cause was filed to recover from such president and directors the amount of such judgment.

The argument of the question will be upon two points:

FIRST. Are the appellants, or any of them, liable to the respondents?

SECOND. If any of the appellants are liable, from whom are the respondents entitled to collect their judgment?

I.

Are the appellants liable?

Respondents contend that they are, because—

A.

They violated their duty to the other creditors of the company in giving to their president an unlawful preference.

The statute provides, that when a company becomes insolvent its directors may take certain action, whereby all creditors will be protected.

Sec. 69; Title—Corporations; Revision.

While the second section of the act relating to insolvent corporations of April 15, 1846, has not

been included in the revision, yet the decision in the case of

Receivers of People's Bank of Paterson vs. The Paterson Savings Bank, 2d Stock., 13,

would still seem applicable in that the design of the statute is, as it then was, "to secure to the creditors of incorporated companies an equal distribution of its assets," and "any act done with the view and for the purpose of defeating this object is illegal, and a fraud upon the act." In fact there may be a question as to whether that section has ever been repealed; it is not inconsistent with the present act; and the acts affecting corporations declared to be repealed, are those of February 25, 1846, and March 2, 1849;—See Revision; Title—Corporations, Sec. 101 and 102;—while, as a matter of fact, the act of 1846 was approved April 15th and not February 25th.

This case presents the bare question as to whether the directors of an insolvent corporation may, after knowledge of its insolvency, lawfully prefer a creditor; and it is contended that such action is contrary to the tenor of the corporation act, as well as to public policy. It certainly appears from the bill and answers that the president of the company was an endorser for it, as above stated; and it is equally clear that his obligations as endorser for that company were cancelled by reason of the sale and the use of the proceeds thereof, and that he was released from all liability, while the respondents have not been paid; such a transaction ought not to be upheld in favor of an officer of a company as against a creditor.

Richards vs. Ins. Co., 43 N. H., 263.

Dury vs. Cross, 7 Wallace, 299.

Thompson's Liability of Officers and Agents of Corporations, page 397.

Taylor: Law of Private Corporations, Sec. 759.

B.

The appellants were not only in error in giving an unlawful preference to Mr. Wilkinson, but the contract with him for the sale above named is voidable, at the option of any creditor.

We insist that the creditors of a corporation are *cestuis que trustent*, and that the president and board of directors are trustees for them. While in some cases stockholders are said to be the corporation itself, yet it has never been questioned that the creditors are *cestuis que trustent.*

As the directors are trustees they have no power to make any contract, whether beneficial or not to themselves, with their officers, or with one another respecting the trust property, which can be upheld if objected to by the creditors or stockholders.

This is now elementary law, sanctioned by the Supreme Court of the United States in the case of

Wardell vs. R. R. Co., 103 U. S., 651;

By the House of Lords in

Ernest vs. Nichols, 6 H. L. Cases, 401;

By the New York Court of Appeals in

Coleman vs. Second Avenue R. R. Co., 38 N. Y., 201; and

Butts vs. Wood, 37 N. Y., 317;

By the Supreme Court of Maryland in

Cumb. Coal and Iron Co. vs. Parish, 42 Md., 598;

By numerous cases in other States, and, as we contend, by the following cases in New Jersey, which were referred to in the argument before *V. C.* Bird, and cited in his conclusions:

Nat. Trust Co. vs. Miller, 6 Stew., 163.

Stewart vs. Lehigh Valley R. R. Co., 9 Vr., 522.

Wetherbee vs. Baker, 8 Stew., 501.

Van Wagoner vs. Savings Bank, 2 Stock., 13.

Guild, Ex., vs. Parker, Rec., 14 Vr., 435.

Gardner vs. Butler, 3 Stew., 702.

See also, Perry on Trusts, section 207. Also, Green's Brices, *Ultra Vires*, pp. 400 and 405.

Jackson vs. Ludeling, 21 Wallace, 616.

And most of the cases above cited, as well as many others, not only declare that such transfers are voidable, but also that those who participate in such sales and dealings are liable to the *cestuis que trustent*, who are damaged by them.

C.

It may be urged that the sale was a fair one, and that the assets of the company brought all, or even more, than they were worth; and that such being the case it is inequitable that the appellants should be held.

Such an argument is unsound, because—

1. By such sale, and subsequent sale, and removal of the company's assets it has become impossible for the respondents to prove their true value.

2. Because the assets were appraised at the instance of a would be purchaser with a view to his interests, and not to the interests of his creditors.

3. Because in every important transaction the creditors of a corporation, as well as the stockholders, are entitled to the efforts of the company in their behalf, and where the officer is both buyer and seller the law presumes that the interests of the creditors will give place to the interests of the purchaser. Or, in other words, that the transaction cannot be presumed, or even proven to be, honest, for all means of proving any undue advantage have been removed by the acts of the purchaser, and all of the evidence is in his control.

While as a matter of justice all *cestuis que trustent* are entitled to the unbiased personal judgment of their trustees, in such cases their interests are in hostile and not friendly hands.

4. Because the proceeds of the sale were unfairly used. Without referring to the position of the president we contend that the respondents were unjustly treated. There can certainly be no doubt that in case there is a deficiency in any estate the trustee is bound to see that each beneficiary receives his *pro rata* share of the balance. In this case that has not been done, and so, even if the sale were fair, the appellants are liable. Trustees should show no favors, but ought to be impartial. Section 69 of the Corporation Act certainly indicates that it was the intention of the Legislature to have all creditors treated alike, and that the actual condition of the affairs of the company should be placed before the stockholders in order that the creditors may be paid and the stockholders receive the surplus, whenever a corporation becomes insolvent.

II.

If any of the appellants are liable, from whom are the respondents entitled to collect their judgment.

A.

All the appellants participated in the sale, and so they are all liable in a greater or less degree, as by the sale the respondents are precluded from obtaining the amount of their judgment, or any part of it.

It appears by the bill that all of the appellants were directors. It also appears by the answers that the sale was the act of all of the directors.

See state of case, p. 13, for answer of E. A. Wilkinson; p. 17, for answers of Woodward, Lundy

and Frank Wilkinson; p. 21 and 22, for answers of Titus and Sargeant.

The actual participation of all the directors in the sale is, as above, admitted of record and need not be further alluded to.

Having participated in an act which has resulted injuriously to the respondents and which was unlawful, the directors are, one and all, jointly and severally liable therefor.

B.

To what extent are the defendants liable?

If the property were within reach of the law the Court might be able to determine its true value after rescinding the sale, but by the removal and use of the assets it has become impossible for any court to undertake this, and the Vice-Chancellor in his conclusions has said, "They" (the assets) "are beyond the control of the Courts. The path pointed out by the statute was disregarded and the great object of the act was frustrated. This being so, who, if any one, ought to suffer from the uncertainty and confusion introduced. I think those who have caused the uncertainty and confusion. Therefore, in my judgment, the complainants are entitled to have their judgment paid in full at the hands of the defendants, who joined in the transfer."

The assets of the company were trust property, and it has been held that where there is an uncertainty arising from an intermingling of individual and trust estates, all uncertain charges must be borne by the individual estate of the trustee and not by the trust estate.

Elmer vs. Loper, 10 C. E. Green, 475.
Frey vs. Demarest, 1 C. E. Green, 236.
Quidort vs. Pugeaux, 3 C. E. Green, 472.
Jewett vs. Dringer, 11 Vroom, 581.

The application of such a principle in this case would fully sustain the conclusions of Vice-Chancellor BIRD, that there has been uncertainty and confusion caused by the acts of the appellants.

Again, it appears by the answers that the value of the assets sold was $22,000, as the property of a concern to be wound up; as a going concern the value was $47,000. Nevertheless the president of the company, with full knowledge of such valuations, offered and paid $50,000 for the assets. We, therefore, contend that under these circumstances the Court is justified in assuming, and ought to assume, that $47,000 was not a fair valuation, as the president would not pay more than the property was worth; and that the president having voluntarily offered $50,000, and the directors having accepted that sum without seeking other or further offers, that the value of the assets in question reached $51,000, a sum sufficient to pay all the debts of the corporation.

WARD & TICHENOR Law Case Printers, 832 and 834 Broad St., Newark, N. J.

N. J. Court of Errors and Appeals.

Between
ELIAS A. WILKINSON, *et al.*,
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and
MICHAEL BAUERLE, *et al.*,
Respondents.

On Appeal from Decree Advised by Vice-Chancellor Bird.

Points of JOHN R. EMERY, for Appellants.

FIRST POINT.

The Vice-Chancellor erred in the statement or findings of facts upon which he based his conclusions of law. He states (*conclusions*, p. 25, l. 20, &c.,) that the defendants, "the directors of the corporation, sold and transferred *all of its assets to one of its officers* and directors after it had become insolvent." By the evidence in the case (the answer under oath,) it appears (1) that the sale did not include the accounts and bills receivable due to the company. (*Bill*, p. 4, l. 1–21; Answer of *Wilkinson*, p. 13, l. 14; of the other defendants, p. 17, l. 23, &c.; p. 22, l. 25, &c.;) (2) that the sale was made not to the officer alone, but to a director and five other persons who were not connected with the company, (*Answer of Wilkinson*, p. 12, l. 1–14, and l. 29–40; of Woodward and others, p. 17, l. 20, &c.; p. 18, l 10, &c.; of *Titus and Sargeant*, p. 22, l. 10, &c.;) (3) the "insolvency" of the company, in the sense of inability to pay its debts at the time of the sale, was not admitted, for by the sale a sufficient sum

was provided to pay the debts, provided the accounts had been collected. The whole amount of indebtedness was about $59,000, (*Bill*, p. 4, l. 8, &c,) the sale was known to produce $50,000; the accounts, &c., have already produced nearly $8,000, (*Bill*, p. 4, l. 5, &c.,) the amount still uncollected is $4,400, (*Answer*, p. 10, l. 13, &c.;) the whole amount of indebtedness is under $1,000, (*Bill*, p. 4, l. 22, &c.; *Answer*, p. 13, l. 12, &c.,) and at the time of the transfer the amount of complainants' debt was in dispute, (p. 13, l. 20.) The "conclusions" of the Vice-Chancellor on the questions of fact are also incomplete, in that they fail to mention (1) that the sale in question was made by the *unanimous consent of the stockholders* of the company. (*Answer, Wilkinson*, p. 12, l. 11, &c.) The defendants were the sole stockholders of the company, as well as its directors, (*Bill*, p. 3, l. 30, &c.;) (2) that the sale was made at a price which was over the fair value of the property, and double what could have been realized by closing up its affairs under legal proceedings. (See *Answers, Wilkinson*, p. 11, l. 20, &c.; p. 12, l. 23, &c.; *Woodward*, p. 17, l. 10, &c.; p. 18, l. 1, &c.; *Titus*, p. 22, l. 13, &c.)

Second Point.

The sale was not made in contemplation of insolvency or to defraud creditors, or even to prefer creditors, but was a sale of a portion of the property for a fair price, in order that the company might have money to pay its debts, and the money was so used. There is no possible fraud *on creditors* in such a transaction, and standing merely on the rights which a creditor would have against an *individual* debtor or against the company for a sale to others than its directors, there could be no ground on which to *declare the sale* fraudulent or invalid.

There was no fraudulent intent in the sale, for by the situation of the company at that time, the sum paid would, in all reasonable probability, give the company enough money to pay all its debts. No charge of actual

fraud in the sale is made by the bill, nor is it prayed that the sale be set aside.

Third Point.

Even if the sale was made in contemplation of insolvency, or for the purpose of preferring a creditor or creditors, such sale or preference is not illegal or fraudulent under the present law relating to corporations, for at the common law an insolvent corporation, as well as an insolvent individual, may prefer one debtor to another, and that part of the statute of 1846, relating to corporations, which forbade such a preference by corporations, was repealed by the *Revision* of 1877.

The second section of the act of 1846 was as follows:

"2. *And be it enacted*, That whenever any such incorporated company shall become insolvent, or shall suspend the ordinary business of the said company, for want of funds to carry on the same, it shall not be lawful for the directors or managers of the said company, or for any officer or agent of the said company, to sell, convey, assign, or transfer any of the estate, effects, choses in action, goods, chattels, rights, or credits, lands or tenements of the said company; nor shall it be lawful to make any such sales, conveyance, asssignment or transfer, in contemplation of the insolvency of any such company, and every such sale, conveyance, assignment or transfer shall be utterly null and void against creditors; *provided*, always, that in case of a bona fide purchase, made for a valuable consideration, before the said company shall have actually suspended the ordinary business of the said company as aforesaid, by any person having no knowledge, information, or notice of the insolvency of the said company, or of the sale being made in contemplation of the insolvency of the said company, such purchase shall not be invalidated or impeached." (*Rev. St.*, p. 129.)

In the corporation act, *Rev.* 1877, p. 188, Secs. 69–82, the other sections of the act of 1846 were embraced, but the second section above set out was omitted, and the

whole act of 1846 was repealed. See *Rev. St.* 1875, p. 179, par. 413. *Rev.* 1395, par. 411. [For a fuller history of the act from its passage in 1829, see my remarks on the cases cited by Vice-Chancellor, *Van Wagenen* vs. *Bank.*]

This left the power of a corporation to prefer creditors as at common law, and the rule at common law was in favor of the right. See,

Bump on Fraudulent Conv., p. 388, note (3), citing—
Catlin vs. *Eagle Bank*, 6 Conn. 233.
Dana vs. *Bank of U. S.*, 5 W. & S. 223.
Burr vs. *McDonald*, 3 Gratt. 215.
Arthur vs. *Commercial Bank*, 17 Miss. 394.
Town vs. *Bank*, 2 Dory, (Mich.) 530.
Hightower vs. *Mushan*, 8 Geo. 506.
U. S. vs. *Bank of U. S.*, 8 Rob. (La.) 262.
Dundas vs. *Bowler*, 3 McLean, 397.

In *Sargent* vs. *Webster*, 13 Metcalf, 497, Ch. J. SHAW, p. 503, says "that a conveyance of all its property by an insolvent manufacturing corporation to one of its creditors, to apply it to his claim and pay over the surplus, although a preference is not fraudulent or invalid, because the corporation was not subject to the insolvent laws, and payment of the debts is one of the purposes of a trading corporation."

Under the act of 1877, the power of a creditor or stockholder to have the corporation declared insolvent, and to have its assets ratably administered by a receiver, is retained, but since the repeal of the second section of the act of 1847, it is no longer *the duty of the directors* to institute such proceedings or to discontinue business.

In the present case the creditors who, under the statute, (Sec. 70,) had the right to apply to have the company declared insolvent, refrain from so doing, and in lieu of this now claim that they are entitled to hold the directors as directors personally responsible *for the whole amount of their debt*, because they did not as directors institute such proceedings, and this is the declaration of the law relat-

ing to corporations, expressly made by the Vice-Chancellor, p. 26, "When they (the directors) discovered the insolvency of the corporation of which they had control, their duty was plain. There was but one course for them to pursue *in order to avoid personal responsibility.* When they adopted any other course they did so at their peril. The cases in our own courts established this doctrine upon the broadest basis." I have made an examination and analysis of every one of the cases cited by the Vice-Chancellor to sustain this proposition, and have annexed it to this brief. It will be seen, I submit, that not one of the cases establishes the doctrine he asserts.

Fourth Point.

Sales by a company to one of its directors or officers are not *ipso facto* void, but only *voidable* at the option of the *cestui que trust*, that is, the company *or its stockholders.* And if the stockholders all consent the sale is valid, as against all persons concerned, including creditors, provided the sale itself was for a fair price, and without any intent to defraud creditors.

That the stockholders are the *cestui que trust* of the directors and *not the creditors*, see the cases cited by the Vice-Chancellor in analysis annexed. The only fund of a corporation which has been held in any of these cases to be a trust fund for the creditors, is the *unpaid capital stock*, and this is the result of the legislative declaration to that effect. See *Wetherbee* vs. *Baker*. There is no case in New Jersey holding that the whole property or "capital" of a corporation is a trust fund for its creditors, which must be equally distributed by the directors, under pain of personal liability, and the establishment of the doctrine laid down by the Vice-Chancellor, carried out to its logical result, would soon impose such burdens and penalties on directors as to deter prudent men from assuming the office, and thus impair if not destroy the usefulness of corporations as business agencies.

On the question of the effect of the consent of the stockholders to a sale to one of the directors or officers, see also,

Ashurst's Appeal, 60 Pa. St. 290, p. 314. STRONG, *J.*, says: "Such sales are supported in equity, when the purchase was made *with the full consent of the stockholders*, or where the stockholders have, by their acquiescence, debarred themselves from questioning the transaction." This was a suit by a stockholder to *set aside* the transfer to a director.

On the general question as to the validity of sale to a director, a preference of a director who is a creditor, see also,

Buell vs. *Buckingham*, 16 Iowa, 284.
Whitwell vs. *Warner*, 20 Vert. 452.
Catlin vs. *Eagle Bank*, 6 Conn. 233.
Smith vs. *Skeary*, 47 Conn. 47.

FIFTH POINT.

Admitting the sale in question to be "fraudulent and invalid, as against the complainants," as found by the decree, the only proper relief to the complainants was to have the *sale set aside*, and on the basis of setting aside the sale such other decree should have been made as the equities of the case required, between the company, the purchasers and the creditors, as the bill in this case was filed for the benefit of creditors. (See *Bill*, p. 6, l. 40, &c.) But by this decree the sale has been declared "fraudulent and invalid," in the absence of all of the purchasers but one, who received only a two-fifths interest in the property conveyed. No declaration is made that the sale is illegal or fraudulent so far as the three-fifths interest is concerned. Nor is any decree made setting the sale aside.

The opinion and decree is in effect that this sale of a two-fifths interest in a portion of the company's property made to one of the directors, although full price was paid and the object of the same was to provide

money to pay debts of the company, was illegal and fraudulent against all of the creditors of the company, *and therefore* the directors who made it *must pay the creditors in full*, whatever may have been the value of the property, or whatever benefits the company or its creditors have received from the sale. Where was such a doctrine ever propounded by a court before? What if the claim of this creditor had been ten or twenty, or even fifty thousand dollars, instead of one thousand? Were the defendants held personally liable for the claim because "it was small?"

The reason given by the Vice-Chancellor for not inquiring into the value of the property and regulating the rights of the parties on that basis, is wholly unfounded. This reason is (p. 26): "that the true value of those assets cannot be ascertained." Why not? There was an inventory taken at the time by a person familiar with the value, and defendants are ready, if necessary, to substantiate and verify their statements as to the value. Every day the Court of Chancery inquires as to the value of property in cases where the elements of fixing value are not as easily reached as in this case. The difficulty is as imaginary as the "statute," for disregarding which the defendants have been made subject to a *penalty*, viz., that of paying the creditors' debt. There is no *statute* imposing any such penalty or liability.

The debt which they are ordered to pay is that of another, for which they have had no value or consideration, and it has been imposed as a penalty for the alleged disregard of a statute. I respectfully submit that there was no statute which touched the question—no duty imposed on the directors which they have failed to perform; that the sale in question was legal and fair in all respects, and that the decree should be reversed with costs.

N. J. Court of Errors and Appeals.

MARCH TERM, 1886.

WILKINSON AND OTHERS, *Appellants,* and BAUERLE AND OTHERS, *Respondents.*		*On Appeal from Decree Advised by Vice-Chancellor Bird.*

REVIEW OF CASES cited by Vice-Chancellor BIRD, *Record*, p. 26.

National Trust Company vs. *Miller*, 6 Stew., 163, (Vice-Chancellor VAN FLEET, 1880.)

The decision in this case was that a mortgage made by a corporation without any consideration, and as a gift, to secure the debts or obligations of another corporation, could not be enforced as against the creditors of the corporation whose debts were unpaid, although every stockholder consented to the execution of the mortgage; and on a bill filed to foreclose the mortgage, the receiver of the corporation was held to represent the creditors, as well as the corporation, and entitled to set up this defense. The bill was dismissed. The general principle upon which this case rests, is the familiar rule that a conveyance of property by way of gift or without consideration, is fraudulent and void as against all existing creditors, and the further rule applicable to corporations, that having by its charter no power to enter into such collateral undertakings, the mortgage was also void as to subsequent creditors. (p. 161, &c.)

It is not an authority upon the questions involved in this case.

Stewart vs. *Lehigh Valley Railroad Co.*, 9 Vr., 505, 522, (Court of Errors, 1875.) This case, so far as the relations of a director to his company are concerned, decided that where any *express* contract is made by a company with a director and the director's right rests on the contract alone, the contract is *voidable* at the option of the *company*, upon the ground that the *company* is the *cestui que trust* of the director; and the case further held (p. 524,) that this *right of avoidance* of the contract was a personal privilege belonging to the company and its stockholders, and was not a right transferred to the defendant by a lease of the property, franchises, &c., of the company. The *contract was sustained* and enforced against the lessee by the Court of Errors, and the judgment of the Supreme Court entered in favor of the defendant on trial at the Circuit was reversed.

Wetherbee vs. *Baker*, 8 Stew., 501, (Ch. App., 1882.) In this case a bill was filed by a creditor of a corporation against the original subscribers to the capital stock, to compel them to pay in the amount of the subscriptions to the "capital stock," under the fifth section of the corporation act, (*Rev.* 178,) providing that "where the whole capital of a corporation shall not have been paid in, and the capital paid shall be insufficient to satisfy the claims of its creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share as fixed by the charter of the company, or such proportion of that sum as shall be required to satisfy the debts of the company." The Court (DEPUE, *J.*, p. 503,) distinguished between the "capital" of a company, which in its general sense denotes all the property of the company constituting its assets, and subject to execution, and its "capital stock," which represents the interest of the *stockholders* in the corporation, and held (p. 506) that under this section, the sum of the unpaid subscription to the "capital" in the sense of "capital stock," is a general trust fund for the payment of all the creditors equally. The section in question requires (1) that the "capital" or property of

the company seizable on execution should be exhausted; (2) that all the property and assets of the company must be taken into account in the suit, as well as its whole indebtedness, and the amount necessary to pay the indebtedness ascertained; and (3) that all creditors share equally in this particular fund.

The case did not at all touch the question of the rights of creditors in the *property* or "capital" of the corporation, which is the question involved in this suit.

Van Wagener vs. *Savings Bank*, 2 Stock. 13, (Williamson Ch. 1854.)

This was a bill filed by the receiver of the People's Bank, appointed under the act of April 15, 1846, against the Savings Bank, to compel them to account for the proceeds of certain promissory notes which had been delivered over to it by the People's Bank, in contemplation of its insolvency, and by way of preference. The Chancellor (pp. 19 and 20,) held that this transfer was in direct violation of the *second* section of the act, which provided that "whenever any incorporated company shall become insolvent * * it shall not be lawful for the directors or managers of the said company to sell, assign or transfer any of the effects, &c., * * of the company; nor shall it be lawful to make *any such sale, transfer, &c., in contemplation of the insolvency of any such company*, and every such sale, transfer, &c., shall be utterly null and void as against creditors." This decision was expressly put upon this second section of the statute, *which has been repealed.* The original act, called "An act to prevent Frauds by Incorporated Companies," was passed *Feb. 16, 1829.* (*P. L.* 1828–29, p. 58, &c.) *Harr. Comp.* 212, &c. This contained 21 sections, the *second* being in part above set out, and the whole section being printed in the foregoing brief. An amendment to the act was passed March 11, 1842, (*P. L.* 164,) authorizing the receivers appointed under the act to sell the franchises of railroad and other companies under the act.

By the *Revision of 1846* the two acts were combined into one act, consisting of 21 sections. The 5th section

of the original act, prescribing the penalty for overdrawing accounts by officers of banks, having been omitted. See "An act to prevent frauds by incorporated companies." *Revision*, approved April 15, 1846. *Rev. Stat.* 129–136.

By the revision of 1877 the *second*, third, fourth, and eighteenth and nineteenth sections were omitted, (the *third*, *fourth* and *eighteenth* sections, relating to banks,) and the remainder of the act was incorporated under the general act, "An act concerning corporations." *Revision* approved April 7, 1875. *Rev.* 175, &c., in sections 69 to 82.

The *second* section of the original act of 1829 and of the *Revision* of 1846, was intentionally omitted, and has not been re-enacted.

The 18th and 19th sections of the act of 1846 were incorporated in the act concerning banks as sections 53 and 54.

The *entire act* of 1846 was *expressly repealed* by the act of general repealer, April 9th, 1875. *Revised Statutes*, 1885, p. 179, No. 413. *Rev.* 1122, Sec. 16, and 1395, *No.* 411, "An act to prevent frauds by incorporated companies." Revision approved April 15, 1846.

The above case, therefore, and all others decided upon the statute as it existed before the repealer of the second section are inapplicable, *e. g.*, the case of *The State Bank* vs. *Receiver*, *&c.*, 2 Green's Ch. 270, and *Receiver*, *&c.*, vs. *Paterson Gas Light Co.*, 3 Zabr. 291, referred to by Chancellor WILLIAMSON in his opinion.

Guild, Executor, vs. *Parker, Receiver*, 14 Vroom, 430, (Court of Errors, 1881.) In this case it was held that the *Receiver* of an insolvent Insurance Company, appointed under the statute, as the representative of the *company, and each one of the stockholders*, was entitled to treat as void a contract made by the directors, by virtue of which they transferred to themselves certain mortgages of the company, and that the receiver was entitled to re-

cover from the estate of one of the directors who had died, the amount of the mortgages received by his estate.

Gardner vs. *Butler*, 3 Stew. 702. (*Err. & Ap.* 1879.)

This was a bill by the *assignee of a stockholder*, claiming *as stockholder*, (*inter alia*,) that he was entitled to an account of the money which had been received by the president of a company for his commissions on sales for the company, on the ground that the rate of the commission was in part fixed by his own act as a member of the board of directors.

The Court held in this case (VANSYCKEL, *J.*, p. 721, &c.,) that a contract made by the directors with themselves is of no binding validity, as a *contract* against the *cestui que trust*—but the *cestui que trust* in this case was the *company* and the *stockholder*, and it was further held that although the contract, *as a contract*, fixing compensation for services, was illegal, yet the directors were entitled to recover a fair compensation for the services performed—even against the *cestui que trust.*

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NEW JERSEY

Court of Errors and Appeals.

BETWEEN
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Appellants,
and
MICHAEL BAUERLE ET AL.,
Defendants.

On Appeal, &c.

Bill for Relief.

[Filed October 20, 1884.]

IN CHANCERY OF NEW JERSEY.

BETWEEN
MICHAEL BAUERLE ET AL.,
Complainants,
and
ELIAS A. WILKINSON ET AL.,
Defendants.

On Bill, &c.

To his Honor, Theodore Runyon, Chancellor of the State of New Jersey—

Humbly complaining show unto your honor your orators, Michael Bauerle and Frank B. Stark, of the city of Chicago and State of Illinois, that they are co-partners

in trade, doing business under the firm name and style of Bauerle & Stark, in the city of Chicago aforesaid.

That as such co-partners they recovered a judgment in the Supreme Court of the State of New Jersey, against the New York Sewing Machine Company, on the second day of May last, for the sum of nine hundred and forty-one dollars damages, and thirty-two dollars and thirteen cents costs of suit; that execution was then issued, directed to the sheriff of the county of Essex, and that he has since returned the same unsatisfied, no part of the said damages or costs having been realized.

And your orators further show that the entire amount of said judgment and costs is still due and owing to them; that the said "The New York Sewing Machine Company" has no assets subject to execution, and that these complainants are informed and believe that said corporation has no assets whatever, excepting about four hundred dollars in book accounts against debtors, scattered at a great distance through the country, and that said accounts are nearly, if not entirely, worthless and uncollectable.

And your orators further show, that "The New York Sewing Machine Company" was organized in the city of Newark, in this State, under the laws of this State; that said company was originally incorporated under the name of the Wilkinson Manufacturing Company, as appears by their certificate filed on the twenty-eighth day of December, A. D. eighteen hundred and eighty-one, in the office of the clerk of the county of Essex; that on the thirtieth day of January, A. D. eighteen hundred and eighty-two, the name of said Wilkinson Manufacturing Company was changed to the New York Sewing Machine Company, as appears by a certificate filed in the office of said clerk, and that said company thereafter did business under that name.

These complainants further show that the capital stock of said company was fixed at one hundred thousand dollars, and certificates were afterwards filed under which an increase therein was permissable; that there were to be one thousand shares of said stock, having a par value

of one hundred dollars each, and that it appeared that Thomas C. Woodward owned one share, Elias A. Wilkinson owned four hundred and forty-nine shares, Frank A. Wilkinson owned one hundred shares, Abram V. Sargeant owned one hundred shares, and William Titus owned fifty shares; that said company was to commence business with a capital stock of seventy thousand dollars, and the above named persons were the owners thereof and had that amount of stock issued to them.

That your orators are informed that said capital stock was afterwards increased to seventy-two thousand dollars, but they are not informed and cannot state who the owner or owners of the additional two thousand dollars of stock were.

And your orators further show that the said the New York Sewing Machine Company commenced the business of making and selling sewing machines, and established offices in the city of Newark aforesaid, and in the city of New York, for the transaction of their business, and manufactured their goods in the city of Hartford and State of Connecticut; that they continued in business until the month of June, A. D. eighteen hundred and eighty-three, and that during the said period they purchased goods and merchandise from these complainants, and that the judgment above mentioned was obtained for goods and merchandise sold by your orators to said company.

And your orators further show unto your honor, that the officers of the New York Sewing Machine Company were Elias A. Wilkinson, who was president and treasurer, R. W. Lundy, who was vice president, and Thomas C. Woodward, who was secretary; that said persons still retain said positions, and that Elias A. Wilkinson, Frank A. Wilkinson, Abram V. Sargeant, William Titus, R. W. Lundy and Thomas C. Woodward, were and still are the sole directors and stockholders therein so far as your orators are informed.

That about or during the month of June, A. D. eighteen hundred and eighty-three, the officers, stockholders and directors of the New York Sewing Machine

Company made a pretended sale and conveyance of a large amount of property consisting of machines, stock, machinery, tools, patents and merchandise to their president, Elias A. Wilkinson; that in said pretended sale was included the entire assets of said company except about five thousand dollars in book accounts and other bills receivable; that the consideration for said pretended sale was fifty thousand dollars; that at the time thereof the said company was indebted to the extent of about fifty-nine thousand dollars; that said Elias A. Wilkinson, as president of said company, called a meeting about that time of the directors of said company and voted for the sale and transfer of said property to himself, he being then the holder of fifty thousand dollars of the stock; that with the proceeds of said pretended sale the said Wilkinson, as president and treasurer, discharged debts of the company to the amount of fifty thousand dollars, and from the book accounts and bills receivable of said company, and some moneys furnished by himself, paid about eight thousand dollars more of the debts of said company.

And your orators further show that their judgment, together with some small amounts which do not together exceed one hundred dollars, constitute, as they believe, the sole indebtedness of said company, all other claims having been paid. They further show that they believe that it was understood and agreed by and between said company and its officers, and said Elias A. Wilkinson, that said Wilkinson, as part of the consideration of said alleged sale, was to pay the entire debts of said company, whether said sum of fifty thousand dollars was sufficient for that purpose or not.

They further show that they are informed and believe that said Elias A. Wilkinson caused some kind of an inventory to be taken prior to the aforesaid sale of the goods, chattels, patents, &c., to him, and that the same, exclusive of the patents, were valued at about eight thousand dollars.

That they are informed that from twelve to fifteen patents of greater or less value were included in said

pretended sale, and that it is impossible for these complainants to state their true value.

That they are, however, informed that thirty thousand dollars in the stock of said company had been issued to Elias A. Wilkinson for one of said patents; that said patent, after a long and expensive litigation, had been declared valid by the courts of the United States; that no adjudication to the contrary has ever been had in any court; that said company had received as royalty upon that one patent, from a license granted under it, about twelve thousand dollars in one year; that said license is still in force, although these complainants are informed that for some reason the royalty is not now paid; that no steps have ever been taken to enforce collection of said royalties in the courts, and that said company was advised by their counsel to take proceedings to collect the same.

And your orators further show that they have no reliable and definite information as to any of the other patents; either as to their value or nature.

Your orators further show that they are informed and believe, and therefore charge the truth in relation to said pretended sale, to be as follows: That the real purchasers of said property were five capitalists who were engaged in the sewing machine business, and who each contributed the sum of five thousand dollars, and Elias A. Wilkinson, who contributed twenty-five thousand dollars; that said five capitalists were represented by one of their number, Dugald Graham; that said capitalists and Elias A. Wilkinson, after or about the time of said pretended purchase, organized a company under the laws of the State of New York, and issued in exchange for the property purchased of the New York Sewing Machine Company, their own paid up stock to the amount of five hundred thousand dollars; that directly or indirectly Elias A. Wilkinson received two hundred and fifty thousand dollars of said stock, and then transferred or caused to be transferred fifty thousand dollars thereof to the said Dugald Graham; that the said Wilkinson retained two hundred thousand dollars

of said stock, and has since transferred or caused to be transferred to the directors, officers and stockholders of the New York Sewing Machine Company, or some of them, some part of said stock so received by him.

They also show that the new company referred to is called "The New York Sewing Machine and Manufacturing Company;" that Elias A. Wilkinson is the president thereof, and that it is now carrying on business at Plattsburg, in the State of New York, and these complainants believe that each and every officer, director and stockholder of the New York Sewing Machine Company has an interest of some nature therein, either legal or equitable, which was received by them in consideration of said pretended sale; and that at the time of said pretended sale, said Wilkinson was an endorser upon notes of said company to the amount of thirty thousand dollars, and by reason of the premises secured an unlawful preference over some creditors of the company.

That they are not informed as to the relative amounts of stock now owned by the parties who are named as the defendants herein, in the New York Sewing Machine and Manufacturing Company, and pray they may make discovery thereof; that they are not informed as to the true value of the stock of said company, nor do they know that it has any market value, but they are informed that some of it has been sold, and therefore ask that the said defendants and each and every of them make discovery as to whether the stock held by them or either of them, or any part thereof, has been sold—and, if so, for what price.

And your orators further show that by reason of the premises they have become unable to collect their aforesaid judgment; that most of the books of the New York Sewing Machine Company are without the limits of the State, and are in such places and kept under such circumstances that your orators have no access to them, and therefore cannot detail the facts and circumstances connected with these transactions with as much precision and certainty as should otherwise be done.

And these complainants further show that they ex-

hibit this bill for their own benefit, as well as the benefit of such creditors as shall come in under this bill and contribute to the expense of this suit.

And that the foregoing matters and things relating to the affairs and transactions of the New York Sewing Machine Company, and its officers, directors and stockholders, are, as against your orators and the other creditors of the said company, fraudulent and in contravention of the laws of this State, and tend to the manifest wrong and injury of your orators and such other creditors, as they deprive them of the power to collect their just dues from said company by process of law, as by virtue of said transactions the said company has not only become insolvent, but has been stripped of all responsibility and property; and your orators are advised and believe that the said Elias A. Wilkinson, Thomas C. Woodward, William Titus, Frank A. Wilkinson, Abram V. Sargeant and R. W. Lundy, have, by reason of their acts and deeds as stockholders and directors and officers of the New York Sewing Machine Company, incurred a personat liability to your orators for the payment of their judgment, interest and costs, both at the common law and under and by virtue of the law and public statutes of this State respecting corporations.

And your orators further show that no receiver has been appointed for the said "The New York Sewing Machine Company," and that no action has been taken by said company or by any one in its behalf to compel its officers and directors to restore its property or the value thereof to said company. On the contrary, your orators assert and charge the truth to be that the said company, by its president, denies that any liability whatever exists from said officers and directors to said company, and refuses to institute any suit or action against said directors and officers, either to set aside the sale of the property of the company or to hold its officers and directors liable for the amounts due the creditors and stockholders of said company.

In consideration of the premises, and forasmuch as your orators have no full, complete and adequate rem-

edy at and by the strict rules of the common law and to the end that the said Elias A. Wilkinson, Thomas C. Woodward, William Titus, Frank A. Wilkinson, Abram V. Sargeant and R. W. Lundy and the New York Sewing Machine Company, may, under their several and respective corporal orths, full, true and perfect answer make to all and singular the matters aforesaid, as fully and particularly as if the same were here again repeated, and they and each and every of them thereto particularly interrogated, and that they and each and every of them may particularly answer and set forth—

1. As to whether any complete and careful valuation and inventory of the goods and chattels and property of the New York Sewing Machine Company was made before the same were conveyed to Elias A. Wilkinson, and, if so, by whom and under what authority.

2. Whether the statements contained in this bill are true, with respect to the consideration of and the circumstances under which the said property was conveyed to said Wilkinson; and if not, in what respect the said statements are erroneous.

3. Whether they, or either of them, consented to said alleged sale to said Elias A. Wilkinson.

4. Whether they, or either of them, now hold stock in the New York Sewing Machine and Manufacturing Company, and if so, in what amount, and what consideration they paid, if anything, for the same.

5. Whether they, or either of them, have sold any stock of the New York Sewing Machine and Manufacturing Company, and if so, at what price per share, and how many shares.

6. Whether the books and vouchers of the New York Sewing Machine Company are kept without the State of New Jersey with their consent.

And that the said Elias A. Wilkinson, Thomas C. Woodward, William Titus, Frank A. Wilkinson, Abram V. Sargeant and R. W. Lundy, or some of them, may be decreed to pay to your orators (and such other creditors as may come in and be made parties to this suit) their said judgment, interest and costs.

And that the aforesaid alleged transfer and sale of the property of the New York Sewing Machine Company may be declared invalid and fraudulent.

And that your orators may have such further or other relief as the nature of the case may require, and as may be agreeable to equity.

May it please your honor to grant unto your orators the State's writ of subpœna, issuing out and under the seal of this court, to be directed to the said Elias A. Wilkinson, Thomas C. Woodward, William Titus, Frank A. Wilkinson, Abram V. Sargeant and R. W. Lundy, and the New York Sewing Machine Company, commanding them to appear before your honor in this court then and there to answer the premises, and to stand to, abide by and perform such order and decree as your honor shall make therein.

PHILEMON WOODRUFF,
Sol. for and of Counsel with Complainants.

Answer of Elias A. Wilkinson.

[Filed January 31, 1885.]

The answer of Elias A. Wilkinson, one of the defendants to the bill of complaint of Michael Bauerle and Frank B. Starck, complainants in the above entitled cause.

This defendant, answering, says that he admits that the said complainants recovered judgment against the New York Sewing Machine Company, as in said bill of complaint stated and set forth, and that execution was issued thereon and returned unsatisfied, as in said bill stated.

And this defendant, further answering, says that he has no knowledge in respect to the amount now due on said judgment, but he has been informed and believes

that certain goods and merchandise, which had been sold and delivered by said company to a solvent party in the city of Chicago, in the State of Illinois, have been seized upon by said complainants and appropriated by them toward the satisfaction of their claim against said company, upon which their said judgment was founded, but this defendant has no knowledge or information in respect to the means whereby the said appropriation was made, or the amount realized therefrom; and he leaves the complainants to make proof of the amount due upon their said judgment; and, as to the assets of said corporation, this defendant says that the accounts receivable thereof, remaining unpaid, amount to about the sum of four thousand and four hundred dollars, the value whereof this defendant is unable to state, and he leaves the complainants to make such proof thereof as they may be able and may be advised.

And this defendant, further answering, says that it is true that the said company was organized in the city of Newark, in this State, and was originally incorporated under the name of the Wilkinson Manufacturing Company, by certificate filed the twenty-eighth day of December, eighteen hundred and eighty, and that on the thirtieth day of January, eighteen hundred and eighty-two, the name of said Wilkinson Manufacturing Company was changed to the New York Sewing Machine Company.

And this defendant, further answering, says that it is true that the capital stock of said company was fixed at one hundred thousand dollars, and that by certificates thereafter filed, increase thereof was permitted; and that said stock consisted of one thousand shares of a par value of one hundred dollars each; and that Thomas C. Woodward owned one share, Frank A. Wilkinson one hundred shares, Abram V. Sargeant one hundred shares, William Titus fifty shares, and this defendant four hundred and forty-nine shares; and that said company was to commence business with a capital stock of seventy thousand dollars.

And this defendant, in further answering, says that it

is true that said capital stock was afterwards increased to seventy-two thousand dollars, and that the said additional two thousand dollars of stock was taken by said Lundy.

And this defendant, in further answering, says that it is true that said company commenced the business of making and selling sewing machines, and established offices in the cities of Newark and New York for the transaction of their business, and manufactured their goods in the city of Hartford and State of Connecticut, and continued business until the month of June, eighteen hundred and eighty-three; and that during the said period they purchased goods from the complainants; and that said judgment was obtained for goods and merchandise sold by complainants to said company.

And this defendant, in further answering, says that the officers and directors of said company are correctly named in said bill.

And this defendant, further answering, says that said business was unprofitable and a losing one, and that in the month of June, eighteen hundred and eighty-three, the capital of said company had been and was entirely lost, and this defendant thereupon called together the said officers and directors, and an inventory and valuation of the goods, chattels and property of the said company was made by J. B. McCune, the superintendent of said company, by this defendant's direction, whereby it was ascertained that the said property was worth in the aggregate less than forty-seven thousand dollars as a going concern, but upon a discontinuance of business would not exceed in value more than half that amount; and the said company being indebted for a large sum, this defendant was much concerned lest the said property should be sacrificed, and accordingly made strenuous effort to find a purchaser or purchasers therefor, or capitalists who would interest themselves in the said company, but was unable to do so, except in the manner in which a sale of said property was made as hereinafter set forth.

This defendant made great effort, by every reasonable

means in his power, to find a purchaser or purchasers, but was unable to do so, until one Dugald Graham, representing himself and some of his friends, offered to purchase an undivided three-fifths interest in all the said property and effects, including the patents, for the sum of twenty-five thousand dollars, it being understood that this defendant should take the other two-fifths interest; and this defendant thereupon submitted to the said stockholders an offer to give fifty thousand dollars for all the said property and effects, which was considered by all the stockholders as a beneficial sale, and was accepted by an unanimous vote of said stockholders, whereby this defendant was to give twenty-five thousand dollars for the remaining two-fifths.

The said patents, at that time and for some time previously, had ceased to yield any revenue, and in fact have brought none since, and at the time of said sale had no market value, and the value thereof was purely speculative. The most valuable of said patents being the one mentioned in said bill as having been transferred by this defendant for thirty thousand dollars of the stock of said New York Sewing Machine Company, expired in the month of August last.

This defendant then believed that said property realized its full value, and more than could be realized in any other way, and that in the event of a sale by a receiver, or any other forced sale, would not have brought one-half that sum.

And this defendant, further answering, says that this defendant and Dugald Graham, Smith M. Weed, Andrew Allan, Andrew Williams and Thomas C. Woodward thereupon became incorporated under the laws of the State of New York, by the name of the New York Sewing Machine and Manufacturing Company, with a nominal capital stock of five hundred thousand dollars, two-fifths of which was issued to this defendant, and the other three-fifths to the said other parties, so as aforesaid joining in the formation of the said new corporation; and this defendant never received, directly or indirectly, more than the said two-fifths.

And this defendant, in further answering, says that the said patents, at the time of said sale, although in fact the property of the said New York Sewing Machine Company, stood in the name of this defendant, no transfer thereof having been made by him to said company, and for this reason, and for purposes of convenience generally, the said sale and the transfer of the said assets was made to this defendant, but in fact this defendant purchased the said property for himself, and the said other parties contributing the said sum of twenty-five thousand dollars as aforesaid.

That the said fifty thousand dollars was duly paid and was used in satisfying the debts of the said New York Sewing Machine Company, and also that the accounts and bills receivable of the company, (which formed no part of said transfer and were not included therein,) as part as collected, were used in paying the debts of the company and twelve hundred dollars of the amounts so received by the company was paid to said complainants; their being a dispute as to how much was due them, and this defendant admits that the indebtedness of the company has been reduced to less than one thousand dollars in the aggregate.

And this defendant, in further answering, says that it was not a part of the consideration of said sale that this defendant was to pay the entire indebtedness, or any part of the debts of said company, whether said sum of fifty thousand dollars was sufficient for that purpose or not.

And this defendant, in further answering, says that the books of said New York Sewing Machine Company are in the State of New Jersey; that the said sale and transfer was made in good faith and for a consideration exceeding its fair and full value, and was for the best interest of all parties interested in the said last mentioned company, whether as stockholders or creditors; that no officer, director or stockholder of said last named company, excepting only this defendant and the defendant Thomas C. Woodward, (to whom one share was assigned for the purrose of enabling him to act as a director of the corporation,) has any interest of any nature,

either legal or equitable, in the New York Sewing Machine and Manufacturing Company, and that no officer, director or stockholder of said New York Sewing Machine Company ever received any consideration whatever for joining in or assenting to said sale, except the benefit arising from the said sale, made as hereinabove stated and set forth.

And this defendant, in further answering, says, that by arrangement made between the said parties who joined with this defendant in making the said purchase and this defendant, stock to the amount of fifty thousand dollars of the said New York Sewing Machine and Manufacturing Company was left unissued with the view of having the same issued for cash for the company's benefit, one-half of which was contributed by this defendant, but the said enterprise has been unprofitable and unpromising to such an extent that no part thereof has been issued; this defendant has still belonging to him, and standing in his name on the books of said New York Sewing Machine and Manufacturing Company, stock to the amount of one hundred and thirteen thousand and five hundred dollars, besides which he still ownes stock to the amount of forty thousand dollars, which he assigned to the said Thomas C. Woodward, for said Woodward's accommodation, to enable said Woodward to use the same as a pledge; and the remainder of the said two hundred thousand dollars, being twenty-two thousand dollars, has been assigned by this defendant to various persons for considerations which in no wise affected the making or consenting to the aforesaid sale of assets of said New York Sewing Machine Company.

And this defendant, in further answering, says that the said stock so as aforesaid representing two hundred thousand dollars, was never worth the twenty-five thousand dollars it cost this defendant, and could never have been made to realize that sum; and this defendant says that he has many times attempted to realize twenty thousand dollars for his said interest, without success,

and he is now willing to sell his interest for ten thousand dollars.

And this defendant says that the sales and transfers of said stock so as aforesaid made by him, were in consideration of services rendered this defendant only, and it is impossible for this defendant to state the money value of such services, but he says that the amount of stock so transferred exceeded by many times the amount which he would have been obliged to pay or would have been willing to pay in cash.

And this defendant prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained.

GUILD & LUM,
Solicitors for and of Counsel for Defendant, Elias A. Wilkinson.

State of New Jersey, county of Essex, *ss.*—Elias A. Wilkinson, of full age, being duly sworn according to law, on his oath doth depose and say that the matters and things set in the foregoing answer, so far as they relate to his own acts and deeds, are true, and so far as they relate to the acts and deeds of others, he believes them to be true.

E. A. WILKINSON.

Sworn and subscribed before me this 31st day of January, A. D. 1885.

WM. STEMMERMANN,
Notary Public of New Jersey.

Answer of Defendants Thomas C. Woodward, Richard W. Lundy and Frank A. Wilkinson.

[Filed January 31, 1885.]

The joint and several answer of Thomas C. Woodward, Richard W. Lundy and Frank A. Wilkinson, three of the defendants to the bill of complaint of Michael Bauerle and Frank B. Starck, complainants in the above entitled cause.

These defendants, answering the said bill, or so much and such parts thereof as they are advised it is material for them to make answer unto, say that they admit the recovery of the judgment by the complainants against the New York Sewing Machine Company at the time and for the amount in said bill stated, and the issuing of execution thereon, and the return of said execution unsatisfied, but they have no knowledge or information as to the amount remaining due upon said judgment, and they leave the complainants to make such proof thereof as they may be advised.

And these defendants, further answering, say that said company was originally organized in the name of the Wilkinson Manufacturing Company, and the name thereof was changed as in said bill stated, and that the amount of the capital stock of said company, and the names of the stockholders, and the numbers of shares held by them respectively, is correctly stated in said bill.

And these defendants, in further answering, say that the business of making and selling sewing machines was commenced by said company and continued until the month of June, eighteen hundred and eighty-three, the said company having offices in the cities of Newark and New York, and the manufacturing part of said business being carried on in the city of Hartford, in the State of Connecticut.

And these defendants, further answering, say that the said business was unprofitable and a losing one, and in the said month of June, eighteen hundred and eighty-three, it appeared to them that the said company must discontinue its business, and a meeting of the board of directors was called, and an inventory and appraisement of the tangible assets, other than accounts and bills receivable of said company, was laid before them, with the approximate correctness of which they were entirely satisfied, by which it appeared that the value of said property, as a going concern, was about forty-seven thousand dollars, so nearly as they can now recall the same, and they verily believed that the said property, if sold otherwise than as a going concern, would not realize more than one-half that sum.

And these defendants considered the patents belonging to said company to be of little value, having yielded no revenue for some time previously, and the most valuable having but a short time to run; and these defendants greatly feared that no sale of said business could be made, and Elias A. Wilkinson, one of the defendants, having offered, on behalf of himself and other parties not then interested in the said company, to purchase the property and effects of said company, other than the bills and accounts receivable, and to pay therefor fifty thousand dollars; these defendants joined with the other directors of said company in accepting the said offer, and the said sale was consummated, and the said sum of fifty thousand dollars was paid into the said company and was used in satisfying debts of the said company.

And these defendants, in further answering, say that the said inventory and appraisement was made by J. B. McCune, the superintendent of said company; that a great part of the said property consisted of parts of machines which would be valueless except as old metal, unless the said business was continued; and that great efforts had been made by the officer of said company to effect a sale without success before the said sale was made to said Elias A. Wilkinson; and these defendants then believed, and now believe, that the sale was made

in good faith on the part of all the parties thereto, and that the said consideration was full and fair, and more than could probably have been realized in any other way.

These defendants are unable at the present time to state with accuracy the details of the said inventory and appraisement, but the same was made by the said superintendent by direction of said Elias A. Wilkinson, who was president of said company.

And these defendants, further answering, say that the said Elias A. Wilkinson made the said purchase in the interest of himself and a number of other parties not previously interested in said company, to wit, Dugald Graham, Smith M. Weed, Andrew Allan and Andrew Williams, and these defendants have been informed and believe, that by the arrangement between the said Elias A. Wilkinson and the said other parties interested in said purchase, one-half of the said purchase money was paid by said Elias, and the remaining one-half by said other parties; and that the interests of said parties, respectively, in the property purchased, were to be two-fifths to said Elias and three-fifths to said other parties, and that a corporation was formed for the purpose of continuing the said business with a nominal capital stock of five hundred thousand dollars, which was issued in exchange for the said property purchased from the New York Sewing Machine Company; but these defendants deny that they ever received or had, or now have, any interest, either legal or equitable, in the said new corporation in consideration of said sale; and they say that they never, either directly or indirectly, received any consideration whatever of any name or nature, as a consideration for joining in or consenting to said sale, nor where they moved by any consideration whatever to consent to said sale, except their belief that the same was beneficial to the interests of the said New York Sewing Machine Company and its creditors.

And these defendants, further answering, say that these defendants have not, nor any of them, any interest in the said new company, which is known as the New

York Sewing Machine and Manufacturing Company, except that this defendant, Thomas C. Woodward, holds one share of the capital stock thereof, which was issued to him for the purpose of enabling him to act as a director thereof.

And these defendants, further answering, say that although, as they have been informed and believe, the whole or nearly all of the capital stock of the said new company was issued for the said property, yet in fact the same was not reasonably worth more than the said sum of fifty thousand dollars, and they verily believe that at no time since the promotion of said new company could the entire capital stock of said new company have been sold for more than the said sum of fifty thousand dollars.

And the said defendant Lundy, further answering for himself, says that soon after the organization of said the New York Sewing Machine and Manufacturing Company, he having acquired thirty shares of the capital stock thereof of the par value of one hundred dollars each sold the same to a stranger for the sum of three thousand dollars, but he says that the said stock was not worth any such sum, and the said purchaser was led to make the said purchase by a belief that the future of the said company was peculiarly promising.

And these defendants, further answering, say that they have no knowledge or information of any other sale or sales of the capital stock of said New York Sewing Machine and Manufacturing Company, except the one by said Lundy above mentioned.

And these defendants pray that they may be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

GUILD & LUM,

Solicitors for and of Counsel with Defendants Thomas C. Woodward, Richard W. Lundy and Frank A. Wilkinson.

State of New Jersey, county of Essex, *ss.*—Thomas C. Wooodward, of full age, being duly sworn according to law, on his oath doth depose and say that the matter

and things set forth in the foregoing answer, so far as they relate to his own acts and deeds, are true, and so far as they relate to the acts and deeds of others he believes them to be true.

THOMAS C. WOODWARD.

Sworn and subscribed before me, this 2d day of January, A. D. 1885.

JOHN E. BEALL.

[L. S.] *A Commissioner of Deeds for the State of New Jersey in and for the District of Columbia.*

State of New Jersey, county of Essex, *ss.*—Richard W. Lundy, of full age, being duly sworn according to law, on his oath doth depose and say that the matters and things set forth in the foregoing answer, so far as they relate to his own acts and deeds, are true, and so far as they relate to the acts and deeds of others he believes them to be true.

RICHARD W. LUNDY.

Sworn and subscribed before me this 20th day of December, A. D. 1884.

WM. STEMMERMANN,
Notary Public of New Jersey.

State of New Jersey, county of Essex, *ss.*—Frank A. Wilkinson, of full age, being duly sworn according to law, on his oath doth depose and say that the matters and things set forth in the foregoing petition, so far as they relate to his own acts and deeds, are true, and so far as they relate to the acts and deeds of others he believes them to be true.

FRANK A. WILKINSON.

Sworn and subscribed before me this 15th day of December, A. D. 1884.

WM. STEMMERMANN,
Notary Public of N. J.

Answer of William Titus and Abram V. Sargeant.

[Filed January 31, 1885.]

The joint and several answer of William Titus and Abram V. Sargeant, two of the defendants to the bill of complaint of Michael Bauerle and Frank B. Stark, complainants in the above entitled cause.

These defendants, answering the said bill, or so much and such parts thereof as they are advised it is material for them to make answer unto, answering, say that the said the New York Sewing Machine Company was organized at the time and in the manner in said bill stated, and that the capital stock of said company was held by these defendants, and the other defendants in this cause, in the shares in said bill stated and set forth.

And these defendants, in further answering, say that they became interested in said company only as a means of investment of their money, and that they had not, nor had either of them, any active part in the conduct of the business of said company; and they further say that in or about the month of June, eighteen hundred and eighty-three, in response to a notice that their presence was required at a meeting of the board of directors of said company, they met with the other directors of said company, at which meeting a statement or inventory and appraisement of the property of said company was submitted to the said board, which these defendants understood to have been prepared by J. B. McCune, the superintendent of said company, and which these defendants believed to be a correct statement of the said company's assets; and these defendants became and were satisfied that the capital of said corporation had been and was entirely lost, and that the said property would not bring, if sold at a forced sale, a sufficient sum to satisfy one-half the indebtedness of said company,

and these defendants joined with the other directors of said company in the acceptance of a proposition submitted to said board by the defendant, Elias A. Wilkinson, on behalf of himself and others not previously interested in said company, that he would purchase the said property, other than the accounts receivable, of the said company, and pay therefor the sum of fifty thousand dollars, and that said sale was consummated, and that the said Elias A. Wilkinson paid for the said property the said sum of fifty thousand dollars, all which was used, as these defendants were subsequently informed and believe, in paying indebtedness of said company.

And these defendants, further answering, say that the said business was a losing one from its commencement, and that they felt but little assurance that the patents of the said company were of any substantial value; and they further felt that it would be difficult to effect a sale of said business as a going concern, and that, if sold otherwise than as a going concern, a great part of the said property, which consisted of parts of machines, would realize no more than its value as old metal; and these defendants then believed, and have ever since believed, and now believe, that the said sale was in all respects made in the good faith of all the parties to the said transaction, and that the said consideration was full, and the said sale was advantageous to the interests of the said company and its creditors.

And these defendants, in further answering, say that they have no knowledge or information of any agreement or understanding that said Wilkinson was to pay the debts of the said company, or any part thereof, as a part of the consideration for said sale or otherwise howsoever.

And these defendants, further answering, say that they have been informed and believe, that the said purchase of said property was made by said Wilkinson in the interest of himself and other parties, and that a new corporation was formed to continue the said business; but these defendants have no knowledge or information as to the particulars thereof, or of any of them, and they

leave the complainants to make such proof thereof as they may be able and may be advised; and these defendants deny that they, or either of them, ever, directly or indirectly, received any stock of the said new company, or any interest thereunder, or any consideration for or benefit from the said sale, or that they, or either of them have, or ever did have, any interest whatever in the said new company.

And these defendants, in further answering, say that they have been informed and believe that a judgment has been recovered against said first mentioned company by the complainants, as mentioned and set forth in said bill, and that execution has been issued thereon and returned unsatisfied; but these defendants have no knowledge of the amount due thereon, or of the remaining assets of said the New York Sewing Machine Company, and leave the complainants to make such proof thereof as they may be advised.

And these defendants pray that they may be hence dismissed, with their reasonable costs and charges, in this behalf most wrongfully sustained.

GUILD & LUM,

Solicitors for and of Counsel with Defendants, William Titus and Abram V. Sargeant.

State of New Jersey, county of Essex, *ss.*—William Titus, of full age, being duly sworn according to law, on his oath doth depose and say that the matters and things set forth in the foregoing answer, so far as they relate to his own acts and deeds, are true, and so far as they relate to the acts and deeds of others he believes them to be true.

WM. TITUS.

Sworn and subscribed before me this 6th day of December, A. D. 1884.

C. SOMERVILLE,
Notary Public for N. J.

State of New Jersey, county of Essex, *ss.*—Abram V.

Sargeant, of full age, being duly sworn according to law, on his oath doth depose and say, that the matters and things set forth in the foregoing answer, so far as they relate to his own acts and deeds are true, and so far as they relate to the acts and deeds of others he believes them to be true.

ABRAM V. SARGEANT.

Sworn and subscribed before me this 19th day of January, A. D. 1885.

THOS. J. GARVEY,
Notary Public.

Replication.

[Filed March 3, 1885.]

The replication of Michael Bauerle and Frank B. Stark to the answers of Elias A. Wilkinson, Thomas C. Woodward, Richard W. Lundy, Frank A. Wilkinson, William Titus and Abraham V. Sargeant, defendants.

These repliants saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the answers of the said defendants, for replication thereunto, say that they do and will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto by the said defendants, and that the answers, and each and every of them, of the said defendants are uncertain, untrue and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All which matters and things these repliants are and will be ready to aver and prove

as this honorable court shall direct, and humbly pray as in and by their said bill they have already prayed.

PHILEMON WOODRUFF,
Solicitor for and of Counsel with Complainants.

Order of Reference.

[Filed March 11, 1885.]

It is, on this eleventh day of March, A. D. eighteen hundred and eighty-five, on motion of Philemon Woodruff, solicitor for complainants, ordered that the above stated cause be referred to Vice Chancellor John T. Bird, to hear the same for the Chancellor, and to report thereon to him and advise what order or decree should be therein made.

THEODORE RUNYON, *C.*

Conclusions.

[Filed October 16, 1885.]

BIRD, V. C. The complainants obtained a judgment against the New York Sewing Machine Company, which they seek to enforce against the directors of that company. This special direction is sought, because the directors of the corporation sold and transferred all of its assets to one of its officers and directors, after it had become insolvent. It is undisputed that at the time of this sale the insolvency was known to all the contracting parties. The consideration paid has all been applied to the payment of all the liabilities of the company, except the judgment of the complainants.

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Under the circumstances, it would seem that the directors are responsible. When they discovered the insolvency of the corporation of which they had control, their duty was plain. There was but one cause for them to pursue in order to avoid personal responsibility. When they adopted any other course they did so at their peril. The cases in our own courts establish this doctrine upon the broadest basis. *Nat. Trust Co. v. Miller, 6 Stew., 163; Stewart v. Lehigh Valley R. R. Co., 9 Vr., 522; Wetherbee v. Baker, 8 Stew., 501; Van Wagoner v. Savings Bank, 2 Stock., 13; Guild, Ex'r, v. Parker, Rec'r, 14 Vr., 435; Gardner v. Butler, 3 Stew., 702.* These cases show the voidability of such contracts as well as the liability of the officers who engage in them. And this same doctrine is very plainly expressed in *Perry on Trusts, sec. 207.*

It remains to consider to what extent they are liable; for the whole judgment or only a certain percentage thereof. But who can determine the amount justly due to complainants from the assets of the insolvent corporation? To fix an amount less than the whole, with a certainty that it is just, will be impossible. It is said that the price fixed upon the assets transferred was $50,000. But when it is considered who were the contracting parties, it will, at once, appear that the valuation which they adopted ought not to guide us in this controversy. In every such instance the law takes it for granted that the parties dealing allow their judgments to be controlled by their selfishness.

But we cannot ascertain at this time the true value of those assets. They are beyond the control of the courts. The path pointed out by the statute was disregarded and the great object of the act was frustrated. This being so, who, if any one, ought to suffer from the uncertainty or confusion introduced? I think those who caused the uncertainty and confusion. Therefore, in my judgment the complainants are entitled to have their judgment paid in full at the hands of the defendants who joined in the transfer. And I have less hesitation in coming to this conclusion in this case, since it is shown that all or

nearly all of the creditors, have been paid in full since the insolvency was known and since the sale alluded to.

I will so advise. The complainants should have their costs.

Final Decree.

[Filed November 5, 1885.]

This cause coming on to be heard at the last regular term of the Court of Chancery in the presence of Philemon Woodruff, of counsel with the complainants, and William B. Guild and John R. Emery, of counsel with the defendants, and the pleadings having been read and the proofs taken before the court and the arguments of the respective counsel having been heard; and the court having duly considered the said pleadings, proofs and argument, and it appearing to the court that the complainants are entitled to the relief sought and prayed for by them in their bill of complaint, and that service of process upon the defendant the New York Sewing Machine Company has been waived by the counsel of said corporation, and that no parties other than the complainants have appeard and asked for any relief touching the matters set forth in said bill—

It is on this fifth day of November, one thousand eight hundred and eighty-five, by Theodore Runyon, Chancellor of the State of New Jersey, ordered, adjudged, and decreed, and the said Chancellor, by virtue of the power and authority of this court, doth hereby order, adjudge, and decree that the transfer and sale of the goods, chattels and property of the New York Sewing Machine Company, as mentioned in said bill, is as against the complainant fraudulent and invalid; and the said Chancellor, by virtue of the authority aforesaid, doth further order, adjudge, and decree that the defend-

ants, Elias A. Wilkinson, Thomas C. Woodward, Wm. Titus, Frank A. Wilkinson, Abram V. Sargeant, and Richard W. Lundy, do pay to the complainants (they being the persons who joined in the sale and transfer aforesaid), the sum of eight hundred and seventy-three dollars and forty-five cents, with interest from the second day of May, A. D. eighteen hundred and eighty-four, that being the amount due upon the complainants' judgment as mentioned and set forth in their bill of complaint, together with the costs of complainants to be taxed.

And it is further ordered, adjudged and decreed that the said Elias A. Wilkinson, Thomas C. Woodward, William Titus, Frank A. Wilkinson, Abram V. Sargeant and Richard W. Lundy, shall within ten days after service upon them of a copy of this decree and of the taxed bill of costs in this cause, pay to the complainants the said sum of eight hundred and seventy-three dollars and forty-five cents, together with interest thereon as aforesaid, and the taxed costs of this suit, and that in default thereof an execution therefor do issue according to the practice of this court.

THEODORE RUNYON, *C.*

Respectfully advised,
JOHN T. BIRD, *V. C.*

Petition of Appeal.

[Filed November 16, 1885.]

N. J. COURT OF ERRORS AND APPEALS.

Between Elias A. Wilkinson et al., Appellants, and Michael Bauerle et al, Respondents.	On appeal from Final Decree advised by Vice Chancellor Bird.

To the honorable the Court of Errors and Appeals in the last resort in all causes.

The humble petition of Elias A. Wilkinson, Thomas C. Woodward, William Titus, Frank A. Wilkinson, Abram V. Sargeant and Richard W. Lundy, the appellants in the above stated cause, respectfully shows that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Theodore Runyon, Chancellor of New Jersey, bearing date on the fifth day of November, in the year eighteen hundred and eighty-five, wherein the said Michael Bauerle and Frank B. Stark were complainants, and your petitioners and the New York Sewing Machine Company were defendants, in this respect, to wit, that the said decree adjudges that the transfer and sale of the goods, chattles and property of the New York Sewing Machine Company, as mentioned in the bill of complaint in said cause, is, as against the complainants, fraudulent and invalid, and that your petitioners should pay to the complainants the sum of eight hundred and seventy-three dollars and forty-five cents, with interest from the second day of May, A. D. eighteen hundred and eighty-four, together with the costs of the complainants, to be taxed; and that your petitioners should, within ten days after service upon them

of a copy of said decree, and of the taxed bill of costs in said cause, pay to the complainants the said sum of eight hundred and seventy-three dollars and forty-five cents, together with interest thereon as aforesaid and the taxed costs of said suit, and that in default thereof an execution therefor do issue according to the practice of this court.

And your petitioners humbly appeal from the whole of the said decree, upon the ground that the same is erroneous, for that the complainants' bill of complaint should have been dismissed, with costs, as against your petitioners and for other good and sufficient reasons.

Your petitioners therefore pray that the said decree may be set aside, reversed and for nothing holden; and that your petitioners may have such relief in the premises as to this honorable court shall seem meet.

JOHN R. EMERY,
Sol. for and of Counsel with Appellant.

Answer to Petition of Appeal.

[Filed November 25, 1885.]

The answer of the respondents, Michael Bauerle and Frank B. Stark, to the petition of appeal of Elias A. Wilkinson, Thomas C. Woodward, William Titus, Frank A. Wilkinson, Abram V. Sargeant and Richard N. Lundy, appellants.

These respondents, not acknowledging all or any of the matters which in said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a decree was, on the fifth day of November, eighteen hundred and eighty-five, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition, as is therein

stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced; and these respondents are advised and believe that the said decree is agreeable to equity, and pray that the same may be affirmed, with costs to be adjudged to them.

PHILEMON WOODRUFF,
Sol. for and of Counsel with Respondents.